Office-Supreme Court, U.S.
FILED
OCT 28 1983
ALEXANDER L. STEVAS,

83-714

No.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1983

CITY OF DUNCANVILLE, TEXAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Certiorari to the United States Court of Appeals, Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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October 28, 1983

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in remanding the case to the Trial Court because of inadequate instructions concerning the substitute facility standard, where no objection to the instructions was made in the Trial Court as is required by Federal Rule of Civil Procedure 51, and where no error was assigned by either party in briefs filed in the Court of Appeals as is required by Rule 28, Federal Rules of Appellate Procedure?

2. Whether the "plain error" rule may be applied by the Court of Appeals in civil cases where instructions to the jury were given without objection by either party?

3. Whether the "plain error" rule may be applied in a civil case where instructions were given as requested by the parties, and where no error was raised in either the Trial Court or Court of Appeals by either party?

LISTING OF PARTIES

Petitioner

The following Petitioner is located in Dallas County, Texas.

CITY OF DUNCANVILLE, TEXAS

Respondent

The Respondent is:

UNITED STATES OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE, V. 50 ACRES OF LAND, ETC., ET AL, DEFENDANT, THE CITY OF DUNCANVILLE, DEFENDANT-APPELLANT (NO. 81-1615).

OPINION BELOW

The Opinion of the United States Court of Appeals, Fifth Circuit, is reported at 706 Fed. 2d 1356 and reproduced at Appendix Page A-1. The Judgment of the United States Court of Appeals, for the Fifth Circuit, dated June 13, 1983, is produced at Appendix Page A-21. The Order denying petition for a rehearing and suggestion for rehearing en banc filed by Appellant, City of Duncanville, and Appellee, United States of America, dated September 19, 1983, is reproduced at Appendix Page A-22.

JURISDICTION

The Judgment of the Court below was entered on June 13, 1983, Petitions for Rehearing were timely filed below, and the Petitions for Rehearing were denied on September 19, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF APPELATE PROCEDURE

"RULE 51, FEDERAL RULES OF CIVIL PROCEDURE

At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written request that the Court instruct the jury on the law as set forth in the request. The Court shall inform counsel of its proposed action upon the request prior to the arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

RULE 28, FEDERAL RULES OF APPELLATE PROCEDURE

"(b) BRIEF OF THE APPELLEE. The Brief of the Appellee shall conform to the requirements of subdivision (a) (1)-(4), except that a statement of the issues or of the case need not be made unless the Appellee is dissatisfied with the Statement of the Appellant.

(a) BRIEF OF THE APPELLANT. The Brief of the Appellant shall contain under appropriate headings and in the order here indicated:

(2) A statement of issues presented for a review."

THE STATEMENT OF THE CASE

This is a federal condemnation case. The United States condemned a 50 acre tract of land owned by the City of Duncanville, a municipal corporation in Texas. The property in question was being used as a sanitary landfill by the City of Duncanville. The Petitioner is the City of Duncanville and the Respondent is United States of America.

In the Trial Court the United States contended that the proper measure of damages was the market value of the 50 acres being condemned. The City contended that the proper measure of damages was the reasonable cost of substitute facilities necessary to replace the sanitary landfill being condemned by the United States. The case was tried and submitted to the jury on both theories, with the jury fixing Two Hundred Twenty-five Thousand Dollars ($225,000.00) as the market value of the tract condemned, and Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01) as the reasonable cost of a functionally equivalent substitute facility. A Judgment was entered in the Trial Court for the finding on market value, in the sum of Two Hundred Twenty-five Thousand Dollars ($225,000.00).

The City appealed to the Court of Appeals for the Fifth Circuit. That Court reversed the Judgment of the Trial Court and held that the reasonable cost of substitute facilities was the proper measure of damages and also held that the Trial Court incorrectly fixed the interest on the Judgment.

The Circuit Court did not render judgment on the jury verdict fixing the reasonable cost of a functionally equivalent substitute facility, but remanded the case to the Trial Court because it concluded that the instructions given to the jury concerning the meaning of "substitute facilities" was inadequate to enable the jury to make a fair and complete determination of the cost, including consideration of benefits received, of this particular substitute facility. Under the instructions given to the jury in the Trial Court the jury returned an award of Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01) as the reasonable cost of substitute facilities out of expenses of One Million Two Hundred Seventy-six Thousand Three Hundred Eleven Dollars and Sixteen Cents ($1,276,311.16) incurred by the City of Duncanville.

The case was remanded to the Trial Court although no objection was made to the charge as is required by Rule 51, Federal Rules of Civil Procedure, and no point of error was assigned by Appellee to the Court's charge as is required by Rule 28, Federal Rules of Appellate Procedure.

Without so stating, the Circuit Court has apparently remanded the case under the "plain error" rule since no objections were made in the Trial Court or Court of Appeals to the instructions given to the jury relating to the "substitute facilities" doctrine.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should be granted in this case to resolve the question as to whether or not the "plain error" rule should be permitted in any civil case, and particularly whether or not the "plain error" rule is appropriate in the present case.

Rule 51 of the Federal Rules of Civil Procedure clearly and unequivocally requires objections to a court's charge to be made in the Trial Court. Rule 28 of the Federal Rules of Appellate Procedure clearly requires the Appellee to bring forward in its Brief any issues which it desires to have the Court to rule upon. These rules are applicable to all Federal Courts, however, in some circuits, including the Fifth Circuit, these rules are ignored by application of the "plain error" doctrine.

This writ should be granted because the Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

THERE IS A CONFLICT AMONG COURTS OF APPEALS

The Court of Appeals for the 5th Circuit has applied the "plain error" standard in numerous cases. *Wirtz v. International Harvester Company,* 331 F.2d 462, 465-66 (5th Cir. 1964); *Gower v. Cohn,* 643 F.2d 1146 (5th Cir. 1981); *Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981); *Whiting v. Jackson State University,* 616 F.2d 116 (5th Cir. 1980); *Liner v. J. B. Talley and Co., Inc.,* 618 F.2d 327 (5th Cir. 1980) and *Cruthirds v. R. C. I., Inc.,* 624 F.2d 632 (5th Cir. 1980).

In the case of *Monsma v. Central Mutual Insurance Company,* 392 F.2d 49 (9th Cir. 1968), the 9th Circuit held that the "plain error" rule may not be utilized in civil cases.

This Court should grant a writ and clearly state, for once and for all, whether or not the "plain error" rule is applicable in civil cases in light of the uncompromising

language and the policies of fairness and judicial efficiency incorporated in Rule 51, Federal Rules of Civil Procedure.

THE QUESTION IS SUBSTANTIAL

Whether or not Rule 51 of the Federal Rules of Civil Procedure can be ignored in some circuits and strictly applied in civil cases in other circuits presents a substantial federal question which should be resolved. Rules of Civil Procedure which are designed to be applied in all circuits should be uniformly applied in the circuits, and where this is not done this Court should exercise its supervisory powers to assure uniform application of the Rules of Civil Procedure.

Also, Rule 28 of the Federal Rules of Appellate Procedure should be uniformly applied in all circuits. To permit a circuit court to ignore the plain and unambiguous requirements of these rules creates much doubt and uncertainty in the administration of the Federal judicial system.

THE DECISION BELOW IS INCORRECT

The Trial Judge sought to avoid a remand of this case by submitting to the jury the theory advocated by each party and instructing the jury regarding such issues without objection by either party to the issues as submitted. This was done to permit the Appellate Court to reverse and render judgment in the event the Trial Court selected the incorrect measure of damages. This deliberate and carefully considered action by the Trial Court has been frustated by the Court of Appeals remanding the case where no error was asserted in either the Trial Court or Appellate Court.

The jury was instructed that the cost of substitute facilities means the reasonable cost of supplying substitute facilities reasonably necessary to enable it to serve its constituents in approximately the same way as it would had the condemnation not occurred. The jury was instructed to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill. Out of expenses incurred by the City in constructing a new sanitary landfill costing One Million Two Hundred Seventy-six Thousand Three Hundred Eleven Dollars and Sixteen Cents ($1,276,311.16), the jury awarded only Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01) as the reasonable cost of a functionally equivalent substitute sanitary landfill. The Circuit Court specifically held that the City had met its burden of proving the cost of a functionally equivalent substitute facility.

Even if the "plain error" standard is applicable in civil cases, we respectfully submit that the Court of Appeals has ignored its stated standards in applying the "plain error" rule to the present case.

In the case of *Gower v. Cohn*, 643 F.2d 1146 (5th Cir. 1981) the court stated that the "plain error" rule should not be applied where the case implicated no "broader interest than that of the immediate litigants" and that none of the alleged errors rises the "exceptional" level required to constitute "plain error".

In the present case there is actually no greater interest implicated than that of the immediate litigants. In other words, if the fair market value is the proper measure of damages, the amount to be paid by the United States is Two Hundred Twenty-five Thousand Dollars ($225,000.00), if the substitute facility value is to be applied the amount

to be paid by the United States is the sum of Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01). In other words, the reverse and remand of the case or reverse and rendering of the case involves only the question as to the amount of damages to be paid by the United States.

In the case of *Delesdernier v. Porterie,* 666 F.2d 116 (5th Cir. 1982) the court said that ordinarily the court would not consider issues which were only raised for the first time on appeal except where a refusal to consider the issue would result in a miscarriage of justice or where there was no opportunity to make a timely objection.

In this case there was ample opportunity to make timely objections to the Court's charge, and none were made and no question raised on appeal by the Appellee, and the application of Rule 51 would certainly not result in a miscarriage of justice.

In *Whiting v. Jackson State University,* 616 F.2d 116 (5th Cir. 1980) the court said that if no objection was raised to the jury charge in the Trial Court, that under Federal Rules of Civil Procedure 51 it could not be considered on appeal unless the error is so fundamental as to result in a miscarriage of justice.

In the case of *Liner v. J. B. Talley and Co., Inc.,* 618 F.2d 327 (5th Cir. 1980) the court noted that Federal Rules of Criminal Procedure 52(b) makes provision for noticing plain errors or defects affecting substantial rights, and that there is no such rule under the Federal Rules of Civil Procedure. The court in recognizing the "plain error" doctrine said that it should be confined to exceptional cases where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.

In the present case there was ample opportunity for the Appellee to object to the Court's charge, which it did not, and we respectfully submit that it cannot be seriously urged that awarding damages as found by the jury has seriously affected the fairness, integrity, or public reputation of judicial proceedings.

In the case of *Vicksburg Furniture Mfg., Ltd. v. Aetna Casualty and Surety Company,* 625 F.2d 1167 (5th Cir. 1980) the court held that failure to give a jury instruction offered by the plaintiff must constitute a fundamental error to merit notice on appeal. In the case of *Patton v. Archer,* 590 F.2d 1319 (5th Cir. 1979), after referring to Federal Rules of Civil Procedure 51, the court said that it is true that even absent an objection an appellate court will notice error so fundamental as to result in a miscarriage of justice, but that power would only be exercised in exceptional cases.

In the present case the jury was specifically instructed to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill. No objections were made to this instruction, and, as a matter of act, the word "reasonable" was submitted into the instruction at the request of the attorneys for the United States. The Court below said that the "reasonable cost" of a "functionally equivalent substitute sanitary landfill" is too brief a standard to insure the jury will balance these various positive and negative attributes.

We respectfully submit that the jury did balance the various positive and negative attributes involved by awarding only Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01) as the cost of such substitute facilities out of more than One Million Two Hundred Seventy-six Thousand Dollars ($1,276,000.00) spent by the City in acquiring a substitute facility.

Finally, in conclusion, we respectfully submit that if the "plain error" doctrine is applicable in civil cases, the Circuit Court has incorrectly applied the "plain error" doctrine to the present case by ignoring the standards and criteria which it has stated must exist before the requirements of Rule 51 of the Federal Rules of Civil Procedure may be ignored.

For these reasons the Circuit Court erred in remanding the case and should have rendered judgment in favor of the City in the amount found by the jury to be the reasonable cost of a functionally equivalent substitute sanitary landfill.

PROPER RATE OF INTEREST

This case has also been remanded for consideration by the lower court of the proper rate of interest to be applied to the Judgment. This question was raised by the Petitioner in the court below and was sustained. In the event that this Court should determine that the Judgment of the court below should be rendered in favor of the City in the amount of Seven Hundred Twenty-three Thousand Six Hundred Twenty-four Dollars and One Cent ($723,624.01), with interest as found by the Trial Court, the City would waive its assigned error as to the proper amount of interest on the Judgment.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SANER, JACK, SALLINGER & NICHOLS

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APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

50 ACRES OF LAND, etc., et al., Defendant,

The City of Duncanville,
Defendant-Appellant.

No. 81-1615.

United States Court of Appeals,
Fifth Circuit.

June 13, 1983.

City appealed from judgment of the United States District Court for the Northern District of Texas, Robert M. Hill, J., 529 F.Supp. 220, entered on jury verdict in eminent domain action brought against city. The Court of Appeals, Brown, Circuit Judge, held that: (1) public condemnee which has legal or factual duty to replace condemned facility is entitled to reasonable cost of functionally equivalent substitute facility; (2) trial court's instructions on that theory were inadequate as they did not call for jury to consider any benefits gained by city from obtaining new site for landfill facility; and (3) city would be permitted on remand to present evidence as to the proper rate of interest.

Reversed and remanded.

1. Eminent Domain (Key) 133

Under the Fifth Amendment, public condemnee which has a legal or factual duty to replace the condemned facility is entitled to the reasonable costs of a functionally equivalent substitute facility. U.S.C.A. Const.Amend. 5.

2. Eminent Domain (Key) 133

Generally, substitute-facility standard for measuring just compensation has been applied to the condemnation of streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot be accurately determined; if no substitute facility is necessary, fair market value will be the standard for compensation; often, only nominal damages are justified where such items need not be replaced.

3. Eminent Domain (Key) 122

Object of just compensation is to place a condemnee in as good a position pecuniarily as if his property had not been taken; he must be made whole but he is not entitled to more.

4. Eminent Domain (Key) 122

Purpose of just compensation is to reimburse the owner condemnee for the loss he has suffered by the taking of his property.

5. Eminent Domain (Key) 133

When considering whether public condemnee is entitled to reimbursement on the replacement-facility basis, condemning government must demonstrate more than a reasonably adequate or reasonably passable alternative to that which had previously been used; condemnee is entitled to a facility or method which will handle its legal duty in an equally adequate manner as would have been true had there been no condemnation.

6. Eminent Domain (Key) 133

To deny city reimbursement for its unavoidable loss in replacing sanitary landfill facility upon condemnation by the federal government would be to deny just compensation.

7. Eminent Domain (Key) 205

City which submitted evidence of price of land and expense of preparing site for use as garbage facility presented sufficient evidence to present a case as to the cost of substitute facilities in order to be entitled to have jury consider that theory of reimbursement upon condemnation of original landfill site by federal government.

8. Eminent Domain (Key) 222(6)

Trial court instruction which set forth general purpose and meaning of the substitute-facility standard for reimbursing city for taking of its landfill facility did not adequately enable the jury to make a fair and complete determination of the costs as it did not take into account the need to deduct for benefits which city would gain from acquisition of new site.

9. Eminent Domain (Key) 133

City whose landfill facility was being condemned by government was entitled to reimbursement for reasonable cost of alternative site along with reasonable costs of preparing the site for use as a landfill.

10. Eminent Domain (Key) 263

In view of recent nature of Court of Appeals holding that 6% interest provided by the Declaration of Taking Act is a floor and not a ceiling, city, which had obtained new trial for consideration of damages in eminent domain action against it, would be permitted to present evidence on the proper rate of interest, even though it had not presented evidence of a higher rate at the initial trial. Declaration of Taking Act, § 1 et seq., 40 U.S.C.A. § 258a et seq.

Appeal from the United States District Court for the Northern District of Texas, 529 F.Supp. 220.

Before BROWN and JOLLY, Circuit Judges, and MAHON*, District Judge.

JOHN R. BROWN, Circuit Judge:

[1] Today we find ourselves lodged among melon rinds, coffee grounds, countless tin cans and sundry other unlikely neighbors amidst the City of Duncanville sanitary landfill. In this ignoble setting, we examine one of our most treasured constitutional principles — the Fifth Amendment's precept that private property shall not be taken for public purposes without just compensation. We consider the question of what constitutes the payment of "just compensation" to a public condemnee who has a duty to replace a condemned public facility. Appellee, the United States, contends that Duncanville is entitled only to the fair market value of its old landfill, which was condemned by the government. Duncanville argues that just compensation is the cost of a substitute landfill. We agree with Duncanville and conclude that under the Fifth Amendment a public condemnee which has a legal or factual duty to replace a condemned facility is entitled to the reasonable cost of a functionally equivalent substitute facility. We conclude also that the trial court's instruction concerning the substitute facilities standard was inadequate to enable the jury to make an intelligent determination of that cost. Accordingly, we remand for a new trial.

Indeed, this case is redolent with Fifth Amendment issues, as Duncanville objects also to the trial court's award of 6% interest under the Declaration of Taking Act, 40 U.S.C. § 258a. This Court has very recently held that

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* District Judge of the Northern District of Texas, sitting by designation.

the 6% rate is a floor, not a ceiling, on allowable rates of interest in this situation, and that the refusal to allow a higher rate of interest may be a denial of just compensation under the Fifth Amendment. *U.S. v. 329.73 Acres of Land, Situated in Grenada and Yalobusha Counties, State of Mississippi,* (5th Cir.1983) (*en banc*) 704 F.2d 800. As we remand for a new trial on the issue of the reasonable cost of a substitute facility, we also remand to the district court the question of a proper rate of interest.

Duncanville is a small home rule city of approximately 28,000 people located in the southwest portion of Dallas County, Texas. It operated a sanitary landfill on a tract of approximately 50 acres southwest of the city, along Ballwag Road in Dallas County, near the Tarrant County line. The United States condemned this tract (the Ballwag site) pursuant to the construction of Lakeview Lake, a redundantly named U.S. Army Corps of Engineers flood control project.[1] In accordance with the provisions of the Declaration of Taking Act, the government deposited its estimated value of the condemned property, $199,950.00, into the registry of the Court.[2]

For approximately two years after the taking of the Ballwag site, Duncanville trucked its daily garbage to a landfill near Ferris, Texas, some 22 miles to the southeast. It then acquired a new site of its own in northwest Ellis County (the Ellis County site), approximately the same driving time from Duncanville as the Ballwag site. This site consists of approximately 113.7 acres. Duncanville has been using the Ellis County site since January 1, 1981.

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[1] The parties stipulated to October 3, 1978, as the date of taking.

[2] This money was redeposited in an interest-bearing bank account and later withdrawn, with the accrued interest, by the City of Duncanville.

Duncanville demanded a jury trial on the issue of compensation, contending that the amount offered by the government was inadequate because Duncanville was entitled to the reasonable cost of substitute facilities, rather than merely the fair market value of the condemned property. Duncanville asked for the cost of the Ellis County land, the costs of permitting and preparation, and the costs of the interim use of the Ferris landfill.

After the presentation of evidence and arguments, the trial judge submitted two special interrogatories to the jury. Special question number one required a finding as to the fair market value of the 50-acre Ballwag site, which the jury fixed at $225,000. Special question number two required a finding as to the cost of supplying a functionally equivalent substitute landfill site, which the jury fixed at $723,654.01. The district court then concluded that as a matter of law the market value of the Ballwag site was the proper measure of compensation and entered judgment for $225,000.00. He set interest on the unpaid balance of $25,050.00 at 6%.[3] Duncanville appeals.

The Fifth Amendment to the U.S. Constitution provides,

> [N]or shall private property be taken for public use, without just compensation.

The issue here is what measure of compensation is "just" when a public entity is obligated to replace its condemned public facility.

In *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pennsylvania, (Lutheran Synod)*, 441 U.S. 506, 99 S.Ct. 1854, 60 L.Ed.2d 435 (1979), the Supreme Court declined to discuss the precise question presented here. The Court ruled that the pay-

[3] This amount, a total of $29,934.75, was deposited in the court's registry on December 29, 1981.

ment of fair market value is sufficient compensation to a private non-profit organization whose property is operated for a public purpose.

In *Lutheran Synod*, the Court acknowledged that generally an award of fair market value strikes "a fair 'balance between the public's need and the claimant's loss' upon condemnation of property for a public purpose." 441 U.S. at 512, 99 S.Ct. at 1857, 60 L.Ed.2d at 441, *quoting United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396, 402, 70 S.Ct. 217, 221, 94 L.Ed. 195 (1949). Nevertheless, the Court recognized and reaffirmed that fair market value is not and cannot be the single, inflexible measure of just compensation.

> "[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. . . . Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"

441 U.S. at 512, 99 S.Ct. at 1857, 60 L.Ed.2d at 442, *quoting United States v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S.Ct. 547, 549, 94 L.Ed. 707 (1950). *See also United States v. 320.0 Acres of Land, More or Less, in the County of Monroe, State of Florida*, 605 F.2d 762, 780-81 (5th Cir.1979).

The substitute facilities doctrine arose from that realization that "just compensation" and "fair market value" are not always synonymous. Its genesis is in language written by Chief Justice Taft in *Brown v. United States*, 263 U.S. 78, 44 S.Ct. 92, 68 L.Ed. 171 (1923). In *Brown*, three-quar-

ters of the town of American Falls, Idaho, was to be inundated and destroyed by the waters of a reservoir on the Snake River. In that extreme situation, the Chief Justice observed, "a method of compensation by substitution would seem to be the best means of making the parties whole." 263 U.S. at 83, 44 S.Ct. at 94, 68 L.Ed at 180.[4]

[2] Generally, the substitute facilities standard has been applied to the condemnation of streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot accurately be determined. Numerous cases have recognized and applied this principle. *See, e.g., United States v. Streets, Alleys and Public Ways in Village of Stoutsville, in Monroe County, Missouri,* 531 F.2d 882 (8th Cir.1976); *County of Sarpy, Nebraska v. United States,* 181 Ct.Cl. 666, 386 F.2d 453 (Ct.Cl. 1967); *United States v. Certain Lands Located in the Townships of Raritan and Woodbridge, Middlesex County, New Jersey,* 246 F.2d 823 (3rd Cir.1957); *Town of Clarksville, Va. v. United States,* 198 F.2d 238 (4th Cir.1952); *City of Fort Worth, Tex. v. United States,* 188 F.2d 217 (5th Cir.1951); *United States v. Los Angeles County, Cal.,* 163 F.2d 124 (9th Cir.1947); *United States v. Des Moines County, Iowa,* 148 F.2d 448 (8th Cir.1945); *Jefferson County, Tennessee v. Tennessee Valley Authority,* 146 F.2d 564 (6th Cir.1945). If no substitute facility is necessary, fair market value will be the standard for compensation, when it can be ascertained. *See United States v. 3,727.91 Acres of Land, More or Less, in*

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[4] As Justice Marshall points out in *Lutheran Synod,* 441 U.S. at 509, 99 S.Ct. at 1856, 60 L.Ed.2d at 439, *Brown* addressed the scope of the government's condemnation power. Its reference to substitution as a proper measure of compensation must be viewed as dictum. Recognizing this, we do not rely upon Brown as authority for our decision today, but mention it only for its historical importance.

County of Pike, State of Missouri (Ellsberry Drainage District), 563 F.2d 357 (8th Cir.1977); *United States v. Certain Property in Borough of Manhattan, City, County and State of New York*, 403 F.2d 800 (2d Cir.1968); *State of California v. United States*, 395 F.2d 261 (9th Cir.1968). Often, however, only nominal damages are justified where streets, highways and the like need not be replaced. *See, e.g., Village of Stoutsville, supra; Franklin County, Georgia v. United States*, 341 F.2d 106 (5th Cir.1965), *State of Washington v. United States*, 214 F.2d 33 (9th Cir.1954); *Woodville, Okla. v. United States*, 152 F.2d 735 (10th Cir.1946).

This is a rather different case. Unlike the vast majority of substitute facility cases, here the parties agree that the landfill has a determinable market value, although at trial they disagreed as to what that value was.[5] The United States contends that because fair market value can be ascertained, that value must be the measure of compensation. We conclude, however, that the reasonable cost of a functionally equivalent facility is the just measure of compensation when a public entity is obligated to replace the condemned property.

[3, 4] Although the indemnity principle which animates the just compensation clause of the Fifth Amendment "has not been given its full and literal force," *Lutheran Synod*, 441 U.S. at 510-11, 99 S.Ct. at 1856-57, 60 L.Ed.2d at 440, it must nevertheless be our aim to place a condemnee "in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708,

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[5] That controversy was, of course, settled by the jury. Its finding of $225,000 is somewhat more than the highest figure suggested by the government and considerably less than the lowest figure suggested by Duncanville.

78 L.Ed. 1236, 1244 (1934). *See also 320.0 Acres of Land*, 605 F.2d at 780. The purpose of just compensation is to reimburse the owner/condemnee for the loss he has suffered by the taking of the property.

Duncanville's situation is very different from that of the typical private landowner, or that of the nonprofit condemnee in *Lutheran Synod*. As the Supreme Court emphasized,

> [R]espondent [Synod] is under no legal or factual obligation to replace the camps, regardless of their social worth. As a private entity, respondent is free to allocate its resources to serve its own institutional objectives, which may or may not correspond with community needs. Awarding replacement cost on the theory that respondent would continue to operate the camps for a public purpose would thus provide a windfall if substitute facilities were never acquired, or if acquired, were later sold or converted to another use.

441 U.S. at 515-16, 99 S.Ct. at 1859, 60 L.Ed.2d at 444.

[5, 6] In contrast, in order to continue to provide a necessary public service, Duncanville presumably was required to spend certain monies to purchase a new landfill site and prepare that site for its purpose.[6] Its loss from the condemnation was the amount of money reasonably

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[6] The collection and disposal of garbage by a municipality is a governmental function imposed by law. *City of Fort Worth v. George*, 108 S.W.2d 929 (Tex.Civ.App. – Fort Worth, 1937, *writ ref.*). For the purposes of this appeal, the government does not directly challenge the fact that Duncanville was thereby obligated, either by law or practical necessity, to maintain a sanitary landfill. Solid waste disposal and sanitary landfills are regulated under Tex.Rev.Civ.Stat.Ann. art. 4477-7 (Vernon Supp.1982).

spent in that venture to create a functionally equivalent facility. To deny Duncanville reimbursement for its unavoidable loss would be to deny just compensation.

The Second Circuit has reached the same conclusion. *Certain Property in Borough of Manhattan, supra; United States v. Certain Property in Borough of Brooklyn,* 346 F.2d 690 (2d Cir.1965). *Certain Property in Borough of Manhattan* is particularly instructive. That case dealt with the condemnation by the Post Office Department of a public bath and recreation building owned and operated by New York City. As here, it was agreed that the building had a market value. The City contended that it had a duty to replace the condemned structure and that it was entitled to the cost of the functionally equivalent facility. The United States argued that the City had no legal require-

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The decision as to whether substitute facilities are in fact necessary is a question for the trial court. *Wardy v. United States,* 402 F.2d 762, 763 (5th Cir.1968). Here the court made no finding on the issue, which should be decided on remand. At trial and on appeal, the United States has mentioned testimony to the effect that Fort Worth has been contracting out its garbage collection to private firms. The most that can be said from this mention is that the government is attempting to cast doubt on the necessity for Duncanville to maintain a sanitary landfill. If so, this can be remedied on the hearing on remand.

We remind the trial court that in considering this question, it is not enough for the government to demonstrate a "reasonably adequate" or "reasonably passable" alternative method of garbage collection which does not require city operation of a sanitary landfill. The City is entitled to a facility or method which will dispose of the refuse of its citizens "in an equally adequate manner as would have been true had there been no condemnation." *City of Fort Worth,* 188 F.2d at 221. This necessitates the acknowledgement and consideration of any practical, economic or logistical advantages of the City's operation and control of its own sanitary landfill.

ment to replace the building and that in any event market value was the proper standard of compensation.

The Second Circuit, reversing the district court, held for the City. It concluded,

> The 'substitute facilities' doctrine is not an exception carved out of the market value test; it is an alternative method available in public condemnation proceedings. [Citations omitted] When circumstances warrant, it is another arrow to the trier's bow when confronted by the issue of just compensation.
>
> When the public condemnee proves there is a duty to replace a condemned facility, it is entitled to the cost of constructing a functionally equivalent substitute, whether that cost be more or less than the market value of the facility taken. [Citations omitted] The duty may be legally compelled or one which arises from necessity . . . We hold, therefore, that if the structure is reasonably necessary for the public welfare, compensation is measured not in terms of "value" but by the loss to the community occasioned by the condemnation.

403 F.2d at 803-04.

That loss to the community is the cost of providing the necessary substitute facility. As we pointed out in *City of Fort Worth,* where we also rejected a strict view of the meaning of "necessity", "In any proper view of the requirements of just compensation, the substitute 'necessary' is that necessary to readjust [the City's] street and highway system to serve the municipality's requirements and needs in as adequate a manner and extent and with equal utility as such system would have provided had the facility in question not been condemned, so far as this is reasonably practical." 188 F.2d at 222. That view applies as well to the replacement of the landfill condemned here.

In *United States v. State of South Dakota Game, Fish and Parks Department*, 329 F.2d 665 (8th Cir.1964), decided before either *Certain Property in Borough of Brooklyn* or *Certain Property in Borough of Manhattan*, the Eighth Circuit apparently reached a different conclusion. In that case, the United States had condemned a public park, also in order to build a reservoir. The trial judge, *sua sponte*, submitted a special interrogatory to the jury asking whether order to build a reservoir. The trial judge, *sua sponte*, substitute state park — a question which the jury answered in the affirmative. The court then awarded the state the cost of a substitute site.

The Eighth Circuit reversed. It held that the special interrogatory had impermissibly submitted a mixed question of law — "obligation" — and fact — "need" — to the jury. It concluded moreover that the substitute facility theory was improper because the market value of the condemned property was ascertainable.

We find it unnecessary to determine whether we would follow *South Dakota Game, Fish and Parks Department*. First, the finding of need was highly suspect in that case. Second, and more significant, in *Ellsberry Drainage District, supra*, a more recent case, the Eighth Circuit cited *Certain Property in Borough of Manhattan* and recognized that "[t]he substitute facilities doctrine is not an exception to the fair market value test but merely an alternate means of determining what just compensation is when a public facility is involved." 563 F.2d at 360. In a footnote, the Court observed, "Under the substitute facility doctrine if the structure is reasonably necessary for the public welfare, then the public condemnee is entitled to the cost of constructing a functionally equivalent substitute. However, the key to the application of this doctrine is whether the facility need be replaced." 563 F.2d at 359, n. 2.

Considering the peculiarities of *South Dakota Game, Fish and Parks Department*, and in light of *Ellsberry Drainage District*, there is no indication that the Eighth Circuit would reach a result contrary to that which we reach today. If it would reach such a result, by this opinion which creates no conflict we must respectfully disagree, ally ourselves with the Second Circuit and conclude that here the measure of just compensation is the reasonable cost of a functionally equivalent substitute facility.

[7] The trial court held that Duncanville had not met its burden of proving the cost of a functionally equivalent substitute facility and so had forfeited its case on the issue. With this we must disagree. Duncanville submitted evidence of the price of the land and of the expense of preparing the site. Witnesses testified that it was necessary to acquire the entire tract, at that price, in order to avoid more costly severance damage suits. We express no opinion as to the validity of these contentions, but we consider them sufficient to fulfill Duncanville's burden of presenting a case as to the cost of substitute facilities.[7]

An owner of condemned property "must be made whole but is not entitled to more." *Olson*, 292 U.S. at 255, 54 S.Ct. at 708, 78 L.Ed. at 1244. Accordingly, the district court should at least take into account the comments of the Second Circuit that

> [E]quitable principles undergirding just compensation require that the substitution cost be discounted by reason

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[7] At trial the government presented evidence as to the actual cost of several "comparable" landfill sites. The record clearly shows that all but one of these sites were much too far from Duncanville to be even hypothetically suitable for use as Duncanville's municipal landfill. The government did not demonstrate that any tracts other than the Ellis County site were available for purchase for landfill use in the Duncanville area.

> of the benefit which accrues to the condemnee when a new building replaces one with expired useful years. With deference to several contrary holdings, we believe the amount should be calculated and an appropriate deduction made. [Footnotes omitted]

403 F.2d at 804.

Here the City of Duncanville has perhaps gained noticeably from the replacement of the Ballwag fill with the new Ellis County site. The Ellis County site comprises 113.7 acres compared with 50 acres at Ballwag, some 15 of which had already been filled.[8] According to uncontradicted testimony, the Ellis County site can be filled to a depth of about 20 feet, as opposed to 10 feet at Ballwag. While the Ellis County site is approximately two miles farther away, it is accessible via faster roads. According to testimony, the Ellis County site has a potential life of approximately 41.6 years, while Ballwag was good only for about 12.8 years more. Generally there is disagreement as to the details of the comparative capacities of the two sites. But it is very clear that the Ellis County site is much better in terms of fillable acreage and life-span than Ballwag. In this particular tale of two landfills, Duncanville's garbage might well be heard to say, "It is a far, far better rest I go to, than I have ever known."

Although it recognized that Duncanville might be entitled to the cost of a reasonably necessary substitute facility, the trial court's instruction on special question number two did not take into account the need to deduct

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[8] A portion of the Ballwag acreage was occupied by a creek. At trial there was some dispute as to whether that portion should properly be considered "fillable" acreage.

for the benefits which Duncanville gained from the acquisition of the new fill. The judge told the jury:

> As I previously instructed you, fair market value may not be the sole measure of just compensation. The "cost of substitute facilities" is an alternative measure of just compensation in this case. I will now instruct you regarding this measure of just compensation in this case.
>
> The burden is on the City of Duncanville to establish, by a preponderance of the evidence in the case, that the cost of substitute facilities was as much as the City claims. To "establish by a preponderance of the evidence" has been previously defined, and you are directed to refer back to that definition.
>
> By cost of substitute facilities is meant that compensation due the City of Duncanville for the taking of its public facilities measured by the reasonable cost of supplying substitute facilities reasonably necessary to enable it to serve its constituents in approximately the same way as it would had the condemnation not occcured. It is a method of compensation by substitution. You are to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill.
>
> Supply stated, the cost of substitute facilities represents that amount of just compensation in money to be awarded which will sufficiently allow the City of Duncanville to provide for the replacement of the property and their public facility taken by the Government.

[8] While this instruction fairly set forth the general purpose and meaning of "substitute facilities," we conclude that it was inadequate to enable the jury to make a fair and complete determination of the costs, including consideration of benefits received, of this particular substitute

facility. The "reasonable cost" of a "functionally equivalent substitute sanitary landfill" is too brief a standard to ensure that the jury will balance these various positive and negative attributes.[9] Accordingly, we decline to adopt the jury's award of $723,624.01 and remand the case to the district court for a new trial.

[9] Initially we leave the specifics of the charge to the sound discretion of the trial judge. Likewise, we express no opinion as to the merits or pecuniary accuracy of the various costs claimed by Duncanville.[10] We think it wise,

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[9] We do not adopt, or impose upon the district court, any particular method for making this determination. One possible approach, however, was suggested by the Second Circuit in *Certain Property Borough of Manhattan:*

> Several formulas are appropriate. The one that appears suitable under the facts in the present case is the mathematical formula: One minus the ratio that the remaining useful life of the condemned building [landfill] bears to the useful life expectancy of the substitute facility.

403 F.2d at 804, note 11.

[10] Solely for purposes of illustration, we set forth below the list of costs which Duncanville claimed it incurred in the purchase and preparation of the Ellis County side:

1	Land Cost (Actual)	$ 583,400.00
2	Relocating Mobil Pipeline (Actual)	282,406.63
3	Site Preparation (Actual)	13,063.98
4	Permanent Fencing (Actual)	15,290.52
5	Off-Site County Road (Actual)	107,288.00

however, to mention a few of the expenses for which Duncanville is entiled to compensation. Clearly Duncanville is entitled to reimbursement for the reasonable cost of an alternative site, along with the reasonable cost of preparing that site for use as a landfill. Whether the price actually paid is reasonable under the circumstances is for the jury to decide. In addition, Duncanville is entitled to those expenses incurred in using the temporary site at Ferris, over and above those which would have been incurred at Ballwag.

6	Relocating Stock Pond (Actual – $10,332.50, less $3,500.00)	$ 6,832.50
7	Engineering Study (Actual)	15,000.00
8	Soils Investigation (Actual)	6,479.49
9	Engineering for Soils Inspection of First and Second Cell Areas (Actual)	1,336.39
10	Engineering for Soils Inspection of Additional Cells 150 Cells @ $700.00 Each (Estimated)	105,000.00
11	Three (3) Groundwater Monitor Wells and Initial Resistivity Survey (Actual)	8,419.08
12	Earth Resistivity Survey for Remaining Portion (Estimated – 20 yr. @ $1,000/yr.)	20,000.00
13	Trips to Midlothian and Austin by City Officials in Preparation of Permit	294.93
14	Attorney Fees Obtaining Permit (Estimated)	1,000.00
15	Addition Cost – Landfill Operations Ferris vs. Ballwag	76,927.70
16	Additional Maintenance Cost Trips to Ferris Landfill	25,882.83
17	Additional Fuel Cost Trips to Ferris Landfill	7,689.11
	TOTAL	$1,276,311.16

In holding as we do today, we imply no criticism of the able trial judge. He faced several difficult legal issues and gave them careful and thoughtful consideration. His conduct of the trial was judicious and fair throughout. Nevertheless we hold that the reasonable cost of functionally equivalent substitute facilities is the proper measure of compensation here and that the court's instruction to the jury was inadequate to enable it to make a fully informed and intelligent assessment of that cost.

Very recently in *United States v. 329.73 Acres of Land, supra,* this Court held *en banc* that the 6% interest rate provided as delay damages by the Declaration of Taking Act "sets a floor, rather than a ceiling, on the rate of interest payable on the deficiency." 704 F.2d at 812. Neither the district court nor the government has undertaken to defend the constitutionality of a 6% interest ceiling. Instead the court held, and the government contends, that the City failed to introduce any evidence of an alternative appropriate interest rate; hence the use of the 6% "floor" is appropriate. The City admits its failure to introduce evidence, but contends that the district court erred in failing to take judicial notice of the prevailing rate of interest on U.S. Government Bills and U.S. Government Notes and Bonds for the time, as shown in Federal Reserve Bulletin No. 10, Volume 64, October, 1978.

In support of its argument that Duncanville's failure to introduce evidence justifies the use of the 6% interest floor, the government cities *United States v. 100 Acres of Land, More or Less, in Marin County, State of California (Drake's Beach),* 468 F.2d 1261 (9th Cir.1972) and *United States v. 174.12 Acres of Land, More or Less, in the County of Pierce, State of Washington,* 671 F.2d 313 (9th Cir.1982). In *Drake's Beach,* as here, the landowner, after the jury had rendered its verdict, moved the trial court to award

interest at the prevailing statutory rate, above 6%. The motion was denied and that denial affirmed on appeal. The Ninth Circuit held that the landowner should have presented evidence on the proper rate of interest at trial and that it was "not entitled to another trial to prove additional elements of just compensation which it could have presented during the original trial." 468 F.2d at 1270.

[10] In neither *Drake's Beach* nor *174.12 Acres,* however, was a new trial ordered on the underlying issue of just compensation. Here we remand for a new trial. In light of that fact, and in light of the very recent nature of our *en banc* holding in *329.73 Acres,* we are of the opinion that the City should be allowed to present evidence of the proper rate of interest at trial. As in *329.73 Acres,* we do not attempt to set a formula for the calculation of a proper interest rate; instead we leave that factual determination for remand upon the evidence to be presented. Since the proper interest rate is an element of "just compensation," we consider the determination of that rate to be within the province of the jury as finder of fact. *Wardy, supra; Drake's Beach, supra.*[11]

The Ballwag landfill will soon be, if it has not already been, transmogrified into a muddy lakebed. It leaves behind this lawsuit as a memento of its former life. In that guise, it will linger for some while longer in the federal courts. We regret that we cannot allow it to rest in watery peace, but we conclude that a new trial is necessary to determine what just compensation the City of Duncanville shall receive for its passing.

REVERSED and REMANDED.

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[11] At issue here is the interest to be assessed for the period of time from the date of taking to the date of judgment. This interest rate is not addressed by section 302 of the Federal Courts Improvement Act of 1982, P.L. 97-194, 28 U.S.C. § 1961, which establishes a varying rate for post-judgment interest in federal district court civil cases.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 81-1615

D. C. Docket No. CA-3-78-1221-D

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

50 ACRES OF LAND, ETC., ET AL.,
Defendants,

THE CITY OF DUNCANVILLE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN and JOLLY, Circuit Judges, and MAHON*, District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

JUNE 13, 1983

ISSUED AS MANDATE:

* District Judge of the Northern District of Texas, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-1615

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

50 ACRES OF LAND, ETC., ET AL.,

Defendants,

THE CITY OF DUNCANVILLE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion June 13, 1983, 5 Cir., 198 , F.2d)
(September 19, 1983)

Before BROWN and JOLLY, Circuit Judges, and MAHON*, District Judge.

PER CURIAM:

filed by the City of Duncanville, Texas (xx) The Petition for Rehearing/is DENIED and

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* District Judge of the Northern District of Texas, sitting by designation.

no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc/ is DENIED.

filed by the Government

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ John R. Brown

United States Circuit Judge

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Office - Supreme Court, U.S.
FILED
NOV 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF DUNCANVILLE, TEXAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

Counsel of Record for Petitioner

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November 7, 1983

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA
v.
50 ACRES OF LAND, MORE OR LESS, SITUATED IN
DALLAS COUNTY, STATE OF TEXAS, AND
THE CITY OF DUNCANVILLE, TEXAS, ET AL, AND
UNKNOWN OWNERS,

CIVIL ACTION NO. CA-3-78-1221-D

ORDER

Came on for consideration before the Court, Honorable Robert M. Hill, presiding, the motions for judgment filed by the United States of America (Government), plaintiff, and the City of Duncanville (City), defendant. Having considered the motions, the Court is of the opinion that a judgment in the amount of $225,000 plus interest on the amount of the deficiency should be entered.

This is an eminent domain proceeding. The Government has condemned approximately 50 acres of land owned by the City. The Government is seeking to limit the condemnation award to the fair market value as found by the jury. The City, in turn, is seeking to recover the cost for a substitute facility, an amount as found by the jury substantially in excess of the fair market value of the condemned property. Following a trial on the merits, the jury found the fair market value of the land to be $225,000 and the cost of functionally equivalent substitute facility to be $723,624.01.

Under Rule 71A(h), Fed. R. Civ. P., it is for the Court to decide all issues, factual and legal, other than the precise issue of the amount of compensation to be awarded. *United States v. Reynolds,* 397 U.S. 14, 20 (1970); *United States v. 158.24 Acres of Land in Bee County, Texas,* 515 F.2d 230, 232 (5th Cir. 1975). Thus, it is for the Court to determine which method of calculating just compensation is to be used. *See Reynolds,* 397 U.S. at 20.

The Supreme Court has never ruled on the propriety of substitute-facilities compensation for public condemnees. *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pennsylvania,* 441 U.S. 506, 509 n.3 (1979). In *564.54 Acres,* the Supreme Court held that substitute-facilities compensation was not available to a private condemnee, and that allowing the condemnee the fair market value of its property is consistent with the basic equitable principles of fairness underlying the just compensation clause of the Fifth Amendment. *Id.* at 516-17.

The Court is of the opinion that fair market value is the appropriate measure of compensation in this action. The 50 acres of land condemned by the Government had been used by the City as a sanitary landfill. The City presented evidence on the costs it had incurred as a result of purchasing substitute land to be used as a landfill, as well as interim costs it had incurred for garbage disposal while a new site was being located and purchased. However, the City purchased a much larger tract of land than was condemned and the evidence indicated that they paid a premium for this tract. There was no evidence presented of any attempts by the City to acquire any other tracts of land. The evidence also showed that part of the condemned land had already been used to dump waste. The City failed to establish how this would effect the value of a functionally

equivalent substitute facility. The City did not meet its burden of establishing what would be a reasonable cost of a substitute facility.

The City contends that the acquisition of permits for a sanitary landfill are difficult to obtain and there are only a limited number of areas for which permits can be obtained, so that the buying and selling of landfill properties on the open market in other areas would not be relevant to the City's ability to acquire a substitute facility. The jury was specifically instructed to determine the reasonable cost of a functionally equivalent substitute landfill, and the City urges that the combination of these two factors supports the jury finding.

Assuming the City's assertion that the jury finding is supportable, the fair market-value standard should still be applied. The normal rule for calculating just compensation is to award the condemnee the fair market value of the condemned property. *564.54 Acres,* 441 U.S. at 511. This standard provides a relatively objective working rule that generally strikes a fair balance between the public's need and the claimant's loss upon condemnation for a public purpose. *Id.* at 511-12. Fair market value, however, is not an absolute standard nor an exclusive method of valuation. *United States v. Virginia Electric & Power Co.,* 365 U.S. 624, 633 (1961). There are recognized situations in which the normal rules for calculating just compensation are suspended. The Court must determine whether application of the fair-market-value standard under the facts of this action would be impracticable or whether an award of market value would diverge so substantially from principle of indemnity as to violate the Fifth Amendment. *564.54 Acres,* 441 U.S. at 513. Only when fair market value cannot be determined or would provide inadequate compensation are other measures of value appropriate. *United States v. 3,727.91 Acres of Land,* 563 F.2d 357, 361 (8th Cir. 1977).

The instances in which market value is too difficult to ascertain generally involve property such as roads or sewers, where there is either no market or the property is so infrequently traded that the price obtained in a prior sale would not be representative of the price a sale of the condemned property would bring. *Id.* The vast majority of cases that have utilized the substitute facilities measure of compensation have involved property of this kind. *See, e.g., Caporal v. United States.* 577 F.2d 113 (10th Cir. 1978) (alleyway); *3,727.91 Acres,* 563 F.2d 359 (levees and ditches); *United States v. Streets, Alleys and Public Ways in the Village of Stoutsville,* 531 F.2d 882 (8th Cir. 1976) (streets and alleys); *Franklin County, Georgia v. United States,* 341 F.2d 107 (5th Cir. 1965) (per curiam) (road and bridge); *State of Washington v. United States,* 214 F.2d 33 (9th Cir. 1954) (highway); *Clarksville v. United States,* 198 F.2d 238 (4th Cir. 1952), *cert. denied,* 344 U.S. 927 (1953) (sewer system); *City of Fort Worth v. United States,* 188 F.2d 217 (5th Cir. 1951) (street).

A few cases have extended the application of the substitute facilities measure of compensation to other property deemed reasonably necessary to the public welfare. *See, e.g. United States v. Certain Property Located in the Borough of Manhattan, City, County and State of New York,* 403 F.2d 800 (2d Cir. 1968) (public bath and recreation center); *United States v. Certain Land in the Borough of Brooklyn,* 346 F.2d 690 (2d Cir. 1965) (playground); *United States v. Certain Land in the City of Redbluff,* 192 F.Supp. 725 (N.D. Cal. 1961) (parking lot). The test applied in cases utilizing the substitute facilities measure is whether the condemnee is under a factual or legal obligation to replace the facilities. *E.g. Streets Alley's and Public Ways,* 531 F.2d at 886; *Borough of Manhattan,* 403 F.2d at 803. *See also 564.54 Acres* 441 U.S. at 515.

The Court is of the view that substitute facilities compensation should not be awarded in every case where a public condemnee can establish a duty to replace the condemned property, at least where a fair market value can be established. When the doctrine of cost of substitute facilities is applied, a windfall *necessarily* accrues to the condemnee who is awarded an amount sufficient to replace ancient or depleted facilities with brand new facilities. *Id.* at 517 (Justice White concurring). *See also 564.54 Acres*, 576 F.2d 983, 996-1000 (3d Cir. 1978) (Judge Stern concurring). By definition, a market value represents approximately what it would cost to purchase the same or similar property in the marketplace. If the public condemnee receives the market value of its property, it is difficult to perceive how such an award "would impermissibly deviate from the indemnity principle." *564.56 Acres*, 441 U.S. at 514. As Justice White remarked:

> Obviously, replacing the old with a new facility will cost more than the value of the old, but the new facility itself will be more valuable and last longer. This is true with respect to the condemnation of any facility, whether or not there is an obligation to reproduce it, and I had not understood the Just Compensation Clause to guarantee subsidies to either private or public projects. Similarly, if more demanding building codes or other regulations will enhance the cost of replacement, it is reasonable to assume that compliance itself will be of some benefit to the owner and hence need not be financed by the condemnor.

Id. at 518 (Justice White concurring).

The evidence clearly established that there had been a sufficient number of comparable sales from which a fair market value for the 50 Acres involved in this action could

be determined. The jury finding that $225,000 was the fair market value of the tract in question is amply supported by the evidence. The Court is of the opinion that an award representing the fair market value of the tract does not impermissibly deviate from the indemnity principle; the City is placed in as good a position pecuniarily as if its property had not been taken. The basic principle of just compensation is that the condemnee must be made whole but is not entitled to more. *Olson v. United States,* 292 U.S. 246, 255 (1934). This principle is satisfied by awarding the City the fair market value of the property taken by the Government.

A final issue involves the rate of interest to be awarded on the difference between the condemnation award and the amount deposited with the Court as estimated compensation. The Declaration of Taking Act, 40 U.S.C. §258a (1970), specifically provides that the judgment on a declaration of taking

> shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of the taking, from said date to date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court . . . .

In this action, there was a deficiency in the estimated compensation paid into the Court of $25,050.

The Fifth Amendment requires the payment of interest as an element of just compensation where the date of taking of the property precedes the payment of the award. *United States v. Miller,* 317 U.S. 369, 381 (1943); *Seaboard Air Line Ry. Co. v. United States,* 261 U.S. 299, 306 (1923); *United States v. 5.00 Acres of Land,* 507 F.Supp. 589, 598 (E.D. Tex. 1981). Just compensation requires payment of

"the full equivalent of the value of the [property] ... paid contemporaneously with the taking." *Phelps v. United States,* 274 U.S. 341, 344 (1927).

The City argues that a rate of interest on the deficiency of only six percent contravenes the Fifth Amendment because of the disparity between the six percent figure and the market rate of interest, so that the City is not receiving the full equivalent for its property. It has been held that the six percent rate provided for in the Act operates only as a floor in computing just compensation and cannot be viewed as a ceiling on the rate of interest allowable. *United States v. Blankinship,* 543 F.2d 1272, 1276 (9th Cir. 1976); *5.00 Acres of Land,* 507 F.Supp. 598-99. *Accord, Miller v. United States,* 620 F.2d 812, 837-39 (Ct. Cl. 1980); *United States v. 429.59 Acres of Land,* 612 F.2d 459, 464-65 (9th Cir. 1980); *United States v. 97.19 Acres,* 511 F.Supp. 565, 567-69 (D. Md. 1981); *United States v. 319.46 Acres of Land,* 508 F.Supp. 288, 290-91 (W.D. Okla. 1981).

Assuming the principle enunciated in these cases is a sound one, the difficulty arises in calculating a rate of interest to be applied. There is a strong judicial policy in favor of the establishment of a uniform rate of interest applicable in condemnation cases in order to avoid discrimination among litigants. *Miller,* 620 F.2d at 838. The cases have utilized a variety of methods to calculate the interest rate to be applied. *Cf. 97.19 Acres,* 511 F.Supp. at 569 (long-term corporate rate for Aaa bonds for each individual year from date of taking to date of payment); *319.46 Acres,* 508 F.Supp. at 290 (selection of governmental and private securities with varying lengths of maturity, interest rates averaged throughout the period of the deficiency); *5.00 Acres,* 507 F.Supp. at 599 (interest rate applicable to three-year Treasury bonds purchased on date of taking). Assuming that a proper formula could be deter-

mined, the City presented no evidence from which to calculate the applicable interest rate.[1] Therefore, the Court is of the opinion that a six percent interest rate should be applied to the amount of the deficiency. *See Pitcairn v. United States,* 547 F.2d 1106, 1130 (Ct. Cl. 1977) (Judge Skelton, concurring in part and dissenting in part).

Accordingly, it is ORDERED that the motion for judgment filed by the United States of America is granted, the motion for judgment filed by the City of Duncanville, Texas, is denied, and judgment in accordance with this Order be entered.

Dated this 9 day of December, 1981.

/s/ ROBERT M. HILL

United States District Judge

[1] Apparently, other courts have simply taken judicial notice of such publications as the Treasury Bulletin, the Federal Reserve Bulletin and Moody's Composite Index of Yield on Long Term Corporate Bonds. *See e.g. Miller,* 620 F.2d at 840; *97.19 Acres,* 511 F.Supp. at 569; *5.00 Acres,* 507 F.Supp. at 599.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

50 ACRES OF LAND, MORE OR LESS, SITUATED IN DALLAS COUNTY, STATE OF TEXAS, AND THE CITY OF DUNCANVILLE, TEXAS, ET AL., AND UNKNOWN OWNERS,

CIVIL ACTION NO. CA-3-78-1221-D.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Robert M. Hill, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that just compensation payable by the United States of America by reason of the taking of the title and estates described in the complaint and declaration of taking in the land designated as Tract 318 in these proceedings shall be the sum of $225,000, plus interest on the amount of deficiency of $25,050 (being the amount which this award exceeds the deposit of estimated compensation) at the rate of six percent (6%) per annum from October 3, 1978, until such deficiency is paid into the registry of the Court.

Dated at Dallas, Texas, this 9 day of December, 1981.

/s/ ROBERT M. HILL

United States District Judge

CERTIFICATE OF SERVICE

IN CAUSE NO. 83-714

I, H. LOUIS NICHOLS, Counsel of Record for the City of Duncanville, Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served three copies of the foregoing Supplemental Appendix on each of the attorneys of record herein, by mailing three copies with first class postage prepaid, addressed to the Counsel of Record at the following addresses:

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I further certify that all persons required to be served have been served.

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Supreme Court, U.S.
FILED
JAN 16 1984
ALEXANDER L. STEVAS
CLERK

No. 83-714

In the Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF DUNCANVILLE, TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In this condemnation action the United States acquired a landfill site formerly owned by petitioner. In the district court the United States asserted that just compensation should be measured by the fair market value of the property taken, while petitioner claimed that its actual expenses in acquiring a substitute facility are the measure of compensation due. The district court submitted the case to the jury on the alternative theories, and then entered judgment based on the fair market value of the property. The court of appeals reversed, holding that the cost of substitute facilities was the proper measure of damages, but declined to direct entry of judgment based upon the jury's alternate verdict. Instead, because it concluded that the jury instructions given respecting the substitute facilities cost measure were erroneous, the court of appeals remanded for retrial.

The question presented by the present petition is: whether, given the procedural history of this case, the court of appeals had authority to consider the adequacy of the district court's instructions defining the substitute facilities cost measure of compensation and to remand for retrial, rather than directing entry of judgment on the basis of the jury's alternate verdict.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-714

CITY OF DUNCANVILLE, TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 706 F.2d 1356. The district court's opinion (Pet. Supp. App. 1-8) is reported at 529 F. Supp. 220.

JURISDICTION

The judgment of the court of appeals (Pet. App. A21) was entered on June 13, 1983. Timely petitions for rehearing were denied on September 19, 1983 (see Pet. App. A22-A23). The petition for a writ of certiorari was filed on October 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT*

1. The United States commenced this action on October 3, 1978, by filing a complaint in condemnation, coupled with a declaration of taking, pursuant to 40 U.S.C. 258a, in the United States District Court for the Northern District of Texas. The site acquired was a 50-acre sanitary landfill, owned by petitioner, the City of Duncanville, Texas, used for the purpose of disposal of regular garbage collections. The site was needed by the United States to accommodate the United States Army Corps of Engineers Lakeview Lake flood control project (subsequently renamed the Joe Pool Lake flood control project). As estimated compensation, the United States paid $199,950 into the registry of the court, which was subsequently paid over to petitioner. Pet. App. A5 & n2.

The landfill site had been operated by petitioner for that purpose since 1969; since 1977, the City had operated its landfill under a state permit (Tr. 69-71). At the date of taking, approximately 15 acres of petitioner's landfill had been filled with waste and approximately five acres of the total area were unusable for landfill because of the presence of a creek (Pet. App. A15 & n.8; Tr. 85). Approximately 313,000 cubic yards of the landfill's capacity had been used, and the remaining capacity was 650,000 cubic yards, an amount that gave it an expected lifetime of 12.8 years (Pet. App. A15; Tr. 383-388, 398). Immediately adjacent to petitioner's landfill was a privately owned landfill on a 64.28 acre tract, which had also been acquired by the United States (Tr. 211-213, 345, 352).

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* This statement is essentially identical to the statement of the case embodied in our own petition for a writ of certiorari, *United States* v. *50 Acres of Land*, No. 83-____, filed contemporaneously with this brief in opposition, and is reproduced here for the convenience of the Court. As explained below (page 16 note 13), the question presented by the City of Duncanville's petition is essentially unrelated to the question presented by our own petition.

Following the United States' acquisition of petitioner's landfill site, petitioner acquired a new landfill facility, consisting of 113.7 acres, at a site approximately the same driving time from Duncanville as the prior facility. According to the uncontradicted testimony of an expert geologist at trial, more favorable soil and water-table conditions at the new site made it a better landfill location than the former site; the new site could be excavated to a depth of 20 feet, twice the usable depth of the former landfill. The usable capacity of petitioner's new site was 2,100,000 cubic yards, giving it an expected lifetime of 41.6 years. The residual capacity of the former site thus was only 38.8% of the capacity of the replacement landfill. Pet. App. A5, A15; Tr. 397-399.

2. a. Prior to trial, a dispute emerged between the parties as to the proper measure of just compensation. The government contended that fair market value was the applicable standard; petitioner maintained that it was entitled to recover the cost to the City of acquiring, improving and putting into operation its substitute facility, which it claimed amounted to more than $1,276,000 (see Pet. App. A17 n.10). In order to resolve this dispute as to the proper measure of compensation, the government filed a motion in limine, requesting that the court limit the evidence to be received at trial to evidence relating to the fair market value of the property, and that all evidence as to the cost of reproducing the property taken or acquiring a substitute facility be excluded (R. 62-79). This motion was denied (R. 111), the district court noting that in *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 509 n.3 (1979) (*Lutheran Synod*), this Court had reserved the question whether a substitute facilities measure of compensation is appropriate when publicly owned property is taken. The district court reasoned that "a complete factual record should be developed from which an inde-

pendent determination of the appropriate measure of compensation can be made" (R. 111).

b. The issue of just compensation was then tried to a jury. Both parties presented testimony as to the fair market value of the property taken. Appraisers who testified for the government and those testifying for petitioner agreed that a distinct market existed for landfill properties in the vicinity of Duncanville, and that the fair market value of the condemned site was readily ascertainable by reference to sales of other, comparable, landfill properties in the area. See Pet. App. A9; Pet. Supp. App. 5-6.[1]

In addition, over the government's continuing objection (R. 151-152), petitioner presented the testimony of Robert B. Lee, Duncanville's Director of Public Works, that the aggregate cost of acquisition and preparation of the substitute landfill site established by the City was $1,276,311.76 (Tr. 78). Lee's testimony indicated that although petitioner has the power of eminent domain it did not attempt to acquire a landfill site comparable in size to its former site, and that petitioner did not have the new landfill site it purchased appraised prior to making its negotiated purchase and did not bargain with the vendor over the price (Tr. 91-94). The testimony of the government's appraisers indicated that the amount paid by petitioner to purchase its substitute site was substantially in excess of the fair market value

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[1] The government's witnesses all testified that a market for landfills existed in the area, and testified to fair market value appraisals of petitioner's landfill site ranging from $160,410 to $190,000, based upon comparable sales data (Tr. 208, 218-229, 249-250, 276, 295-297, 298-310, 345-353, 360). Appraisers Carl Mash and R. Edwin White, who testified for petitioner, agreed that a market existed for landfill properties in the area, and, based upon comparable sales, offered valuation appraisals of $370,000 and $367,583, respectively (Tr. 140, 173-178, 182, 189-190).

of that site (Tr. 273, 282, 319-321, 357). The United States moved to strike Lee's testimony, on the ground that it was not probative of the value of a reasonably necessary substitute facility (Tr. 433-434). The court denied the government's motion (Tr. 435).

c. At the close of the evidence, the district court submitted the case to the jury, directing the jury to respond to special questions. Through these questions, the jury was asked to determine both the fair market value of petitioner's landfill on the date of taking, and the cost to petitioner of establishing a substitute landfill.[2] The government objected unsuccessfully to submission of the substitute facilities issue to the jury (Tr. 499-500; see also R. 151-152), while petitioner objected unsuccessfully to submission of the fair market value question (Tr. 499-500). The jury returned a verdict of $225,000 based upon the fair market value standard, and an alternative verdict of $723,654.01 as the cost of substitute facilities (Pet. App. A6).

d. Each party moved for entry of judgment based upon the verdict reflecting the measure of compensation it advocated (R. 203, 223). The district court entered judgment against the United States in the amount of the fair market value of the property taken,

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[2] The jury was instructed (Pet. App. A16):

> By cost of substitute facilities is meant that compensation due the City of Duncanville for the taking of its public facilities measured by the reasonable cost of supplying substitute facilities reasonably necessary to enable it to serve its constitutents in approximately the same way as it would had the condemnation not occurred. It is a method of compensation by substitution. You are to determine the reasonable cost of construction of a functionally equivalent substitute sanitary landfill.
>
> Simply stated, the cost of substitute facilities represents that amount of just compensation in money to be awarded which will sufficiently allow the City of Duncanville to provide for the replacement of the property and their public facility taken by the Government.

as determined by the jury ($225,000) plus interest at the rate of 6% due upon the deficiency in the estimated compensation previously paid by the United States.[3]

The district court held, initially, that petitioner "did not meet its burden of establishing what would be a reasonable cost of a substitute facility" (Pet. Supp. App. 3). The court noted that petitioner's evidence reflected only its actual costs in acquiring and developing its new landfill site, which was much larger than the facility being replaced, and had more unused capacity. The court also suggested that the evidence indicated that the purchase price paid by petitioner was excessive. Pet. Supp. App. 2-3.

The district court also held that, even if the evidence supported a finding as to the reasonable cost of an equivalent facility, the fair market value standard was the proper measure of just compensation, where, as here, a market for property of the kind taken exists, and market value is ascertainable (Pet. Supp. App. 3-6). Noting that fair market value is ordinarily the proper measure of compensation, the court found that neither of the exceptions to that rule recognized by this Court in *Lutheran Synod*, 441 U.S. at 513, was applicable (*ibid.*). The court observed, first, that here, unlike cases involving taking of streets or sewers or other local government property for which no market exists, or for which the market is so thin as to make comparable sale data unreliable, the record established that the fair

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[3] The district court assumed that, as petitioner contended, the 6% interest rate on such deficiencies prescribed by the Declaration of Taking Act, must be regarded as a floor, rather than a ceiling, on the interest to be awarded, lest the discrepancy between the statutory rate and a market interest rate render the statute unconstitutional (Pet. Supp. App. 6-7). But because petitioner had presented no evidence from which an appropriate interest rate could be determined, the court declined to award interest in excess of the statutory rate (*id.* at 7-8).

market value of the property taken was readily ascertainable (*id.* at 4-6). Second, the court determined that compensation based upon fair market value placed petitioner "in as good a position pecuniarily as if its property had not been taken" and that an award based upon fair market value accordngly "does not impermissibly deviate from the indemnity principle" (*id.* at 6). The court also noted that the fair market value standard is a desirable one because it provides a relatively objective measure of compensation due (*id.* at 3).

3.a. The court of appeals reversed and remanded for further proceedings (Pet. App. A1-A20). The court of appeals recognized that this Court's decision in *Lutheran Synod* left open the questions whether, and in what circumstances, the usual fair market value measure of compensation may be superseded by a substitute facilities cost measure when publicly owned property is taken (Pet. App. A6-A7). The court also recognized that the substitute facilities doctrine has generally been applied to taking of "streets, alleyways, bridges, sewers, and other public facilities for which fair market value cannot accurately be determined" (*id.* at A8-A9). And the court acknowledged (*id.* at A9 (footnote omitted)):

> [t]his is a rather different case. Unlike the vast majority of substitute facility cases, here the parties agree that the landfill has a determinable market value, although at trial they disagreed as to what that value was.

Nevertheless, the court of appeals concluded that "the reasonable cost of a functionally equivalent facility is the just measure of compensation when a public entity is obligated to replace the condemned property" (Pet. App. A9). Reasoning from the "indemnity principle" underlying the Fifth Amendment Just Compensation Clause, the Court concluded that petitioner would not be made whole unless reimbursed for "the amount

of money reasonably spent in [its] venture to create a functionally equivalent facility" that it was obliged to establish (*id.* at A10-A11).[4]

The court of appeals recognized (Pet. App. A13) that in *United States* v. *South Dakota Game, Fish and Parks Department*, 329 F.2d 665 (1964), the Eighth Circuit had "apparently reached a different conclusion," holding that the cost of substitute facilities was an improper measure of compensation for the taking of publicly owned property where the market value of that property was ascertainable. But the court below insisted that its decision "creates no conflict" because it believed that a district court finding in *South Dakota Game, Fish and Parks Department* that it was necessary to replace the property taken there, was "highly suspect" (Pet. App. A13-A14). In addition, the court below believed that language in an intervening Eighth Circuit decision, *United States* v. *3,727.91 Acres of Land*, 563 F.2d 357, 359 n.2, 360 (1977) (*Elsberry Drainage District*), cast doubt upon the Eighth Circuit's continued adherence to the rule reflected in its earlier decision (Pet. App. A13-A14).

b. The court of appeals also rejected the district court's alternative holding that petitioner had not met its burden of proving the cost of a functionally equivalent substitute facility. By presenting testimony as to the cost of acquiring and developing its substitute site, and testimony that the entirety of the substitute site had been acquired in order to avoid severance damage claims that petitioner believed would be costly, petitioner had met its burden of going forward with evi-

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[4] The court of appeals assumed for the purpose of its analysis that replacement of petitioner's landfill facility was either a legal or practical necessity, but left open for consideration on remand the question whether this was, in fact, so (Pet. App. A10 & note 6).

dence of the cost of substitute facilities, the court held. Pet. App. A14.

Nevertheless, the court of appeals did not direct entry of judgment based upon the jury's alternative verdict. The court observed that the substitute site acquired by petitioner was substantially larger in area and usable to a greater depth, and accordingly could be expected to serve petitioner for a far longer time, than its former site that had been acquired by the government (Pet. App. A15). The court of appeals held that the district court's instructions defining the substitute facilities measure of compensation (see page 5 note 2, *supra*) "did not take into account the need to deduct for the benefits which Duncanville gained from the acquisition of the new fill" (Pet. App. A15-A16) and that a remand for retrial accordingly was required. The precise manner in which such a deduction was to be made was left open for determination on remand (*id.* at A17 & n.9).[5] The court stated that petitioner "is entitled to re-

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[5] The court suggested that one permissible method of making this adjustment would be to deduct from the cost of substitute facilities a fraction of the total equal to "one minus the ratio that the remaining useful life of the condemned [property] bears to the useful life expectancy of the substitute facility" (Pet. App. A17 n.9, quoting *United States* v. *Certain Property in the Borough of Manhattan*, 403 F.2d 800, 804 n.11 (2d Cir. 1968)).

Also remanded for redetermination was the question of the interest rate to be paid upon any deficiency ultimately determined to be due. The court of appeals reasoned that, because a remand was in any event necessary, petitioner should be allowed another opportunity to present evidence on the interest issue (Pet. App. A19-A20). Applying its prior decision in *United States* v. *329.73 Acres of Land*, 704 F.2d 800, 812 (1983) (en banc), the panel also ruled that interest was not to be limited to the 6% rate specified in the Declaration of Taking Act (Pet. App. A19). See page 6 note 3, *supra*. And reasoning that "the proper interest rate is an element of 'just compensation,'" the court of appeals directed that the interest rate issue be submitted to the jury upon remand (Pet. App. A20).

imbursement for the reasonable cost of an alternative site, along with the reasonable cost of preparing that site for use as a landfill" (*id.* at A18). The court cautioned that "[w]hether the price actually paid [by petitioner for its new site] is reasonable under the circumstances is for the jury to decide" (*ibid.*).

ARGUMENT

Asserting that the United States did not make a timely objection thereto, petitioner contends that the court of appeals lacked authority to consider the adequacy of the district court's instructions to the jury defining a substitute facilities costs measure of compensation. This claim does not warrant this Court's review.

1. We note, at the outset, that the record does not support petitioner's assertion that the United States failed to make a timely objection to the district court's instructions defining a substitute facilities costs measure of compensation. Of course, as indicated above (pages 3-5), the primary thrust of the government's legal argument throughout these proceedings was that petitioner is not entitled to have its compensation measured by the actual cost of the replacement facility it acquired. But the government also consistently made clear that if a substitute facilities measure were to be employed, petitioner's actual expenditures would have to be adjusted downward to reflect the fact that the substitute landfill acquired by petitioner was considerably more valuable than the property taken. For instance, the government's memorandum in support of its motion in limine (see page 3, *supra*) states (R. 75):

> Duncanville does not limit their claim to a cost reproduction (less depreciation) evaluation of [the condemned property], which obviously should set the maximum recovery even under the substitute [facilities] theory * * *.

The district court's pretrial order faithfully reflects the "fall-back" position of the United States (R. 135):

> 10. In rebuttal to the claim of the City for the cost of substitute facilities, the United States contends, without waiving its position that such is not applicable, that the cost for such substitute facility in this case * * * [may in no event exceed] the cost to provide functionally equivalent acreage and/or capacity for the net remaining usable acreage for landfill purposes of [the property acquired by the United States] * * *.

Nor, contrary to petitioner's assertion (Pet. 4), did the government fail to make its position clear at the time the jury was instructed.[6] At the conclusion of closing arguments by counsel, the district court instructed the jury. The instructions given orally at this juncture were identical in material respects to those reproduced at page 5 note 2, *supra*, except that the word "reasonable" that qualifies the term "cost" in the version printed above, was not part of the instructions (see Tr. 488-489). The jury was then discharged for the day and instructed to commence deliberations the next morning (Tr. 495).

After the jury had retired, the court entertained formal objections to the instructions given (Tr. 497). The Assistant United States Attorney commenced by invoking the points previously stated in support of the government's motion in limine (Tr. 497-498).[7] Second, the government argued that there was, in any event, no evidence in the record to justify giving a substitute facilities instruction because petitioners had not shown that

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[6] Of course the government had previously requested that the jury be instructed that it should not consider the cost of a substitute facility in its deliberations (R. 118), and that fair market value is the proper measure of compensation (R. 115).

[7] As indicated above, among the arguments made in support of the motion in limine was that a substitute cost measure, if permissible, had to be limited so as to reflect only the cost of a truly equivalent facility, less depreciation of the facility taken (see page 10, *supra*).

the expenses they incurred were reasonable, but only that they had been incurred (Tr. 498). Finally, the United States objected explicitly to the substitute facilities instructions given on the ground that the jury was not required to find that "the costs that were actually paid were reasonable and necessary" (Tr. 498-499). Government counsel explained (Tr. 499) that the instructions given

> would lead the Jury to think that whatever [petitioner] paid would be a proper amount. I think that's what's been argued to them, whatever [petitioner] paid the Government is bound to reimburse them if they paid it and if this is a proper measure.[8]

The court took the government's objections under submission overnight, promising a ruling in the morning (Tr. 500-501). While the trial transcript does not reflect this event, it appears that the district court decided to respond to the government's objections by inserting the word "reasonable" into the text of the instructions previously given orally in two places (as indicated at page 5 note 2, *supra*). The revised instructions apparently were transmitted to the jury in writing, along with a signed instruction from the court stating (R. 202):

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[8] It appears that the government's concern was based in part upon petitioner's closing argument to the jury. Petitioner's counsel stated (Tr. 464) (emphasis added)): "You've got two questions, one is, what is the market value, and one is, *what the City spent.*" Petitioner's counsel also commented (Tr. 466 (emphasis added)):

> [The government] says we didn't offer any evidence as to the fair market value of the [replacement] site [acquired by petitioner]. Well, we offered evidence of what we paid for it. *And you will note the Court doesn't ask you to find the fair market value of the [substitute] site.* If the Court wanted you to answer that question, the Court would ask you that. The Court didn't. And we knew the Court wasn't so why should we offer evidence on something we knew the Court wasn't going to ask.

> Changes have been made to the instructions regarding Cost of Substitute Facilities. Please reread this page of the Charge.

Thus, assuming compliance with Fed. R. Civ. P. 51 were the controlling consideration here, the government substantially complied with the mandate of the Rule, by contemporaneously objecting to the instructions given.[9]

2. Even if, as petitioner charges, the government had not complied with Fed. R. Civ. P. 51, the action of the court of appeals would be wholly unobjectionable. In considering petitioner's contrary arguments it is important to contrast the procedural posture of this case on appeal, to the typical situation in which Rule 51 is applicable to limit the scope of issues upon appeal. *The government prevailed in the district court.* It was not in the position of urging upon appeal that the judgment of the district court be reversed for reasons that the district court had no opportunity to consider.[10] Rather,

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[9] Petitioner apparently faults the government (Pet. 9) for failure to renew its objection after the court had added the word "reasonable" to the instructions previously given. No authority for this hypertechnical application of Rule 51 is cited. Moreover, the record does not reveal that any proceedings were held in open court following amendment, in writing, of the jury instructions, prior to the time the verdict was returned, at which a contemporaneous objection could have been made. In any event, as explained below, even if noncompliance with Rule 51 were established, the court of appeals acted entirely within its authority.

[10] Of course, even if the government were deemed to have failed to comply with Rule 51, the district court was plainly apprised of the government's position on the very issue upon which the court of appeals remanded (see pages 10-12, *supra*). In the circumstances, the court of appeals would have been free to reach the adequacy of the substitute facilities instructions even at the urging of the government on appeal. *Brown* v. *AVEMCO Investment Corp.*, 603 F.2d 1367, 1373 (9th Cir. 1979).

the government was the appellee, urging affirmance. Moreover, for tactical reasons, the government did not even urge the inadequacy of the substitute facilities instructions upon appeal as an alternative ground for affirmance or in opposition to petitioner's claim that judgment should have been entered based upon the jury's alternative verdict. Rather, the court of appeals reached this issue sua sponte.[11] The government accordingly cannot be faulted for noncompliance with Rule 51, which provides, that "[n]o *party* may assign as error the giving or the failure to give an instruction" unless he makes a timely and specific objection (emphasis added).

And, significantly, the court of appeals, in reaching the adequacy of the instructions given on the substitute facilities cost standard, was *not* venturing outside the area of the dispute framed by the parties' arguments both in district court and the court of appeals; petitioner accordingly may not claim that it was unfairly surprised by the court of appeals' ruling. Although the court of appeals addressed the substitute facilities costs instructions sua sponte, its decision to do so, and the ground upon which it remanded for modification of those instructions and retrial, are intimately interrelated with the arguments made by the government on appeal in support of the district court's judgment, based upon its ruling that fair market value is the proper measure of compensation. Thus, consistent with its argument in the district court, the government argued on appeal that use of a substitute facilities costs measure would confer a substantial windfall upon petitioner, because its substitute landfill was larger and more valuable than the facility replaced (U.S. Br. 25-27).[12]

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[11] Thus petitioner's assertion (Pet. 4) that the government failed to comply with Fed. R. App. P. 28 is frivolous.

[12] The argument was offered, in part, in support of the district court's alternative holding (see page 6, *supra*) that petitioner had not met its burden of establishing the reasonable cost

The court of appeals obviously found considerable force in that argument, but did not believe it dictated the disposition the government sought—rejection of the substitute facilities cost standard. Instead, the court of appeals held that refinement of that standard was required. In the circumstances, that disposition plainly was not in excess of the court of appeals' authority.

3. Petitioner's submission necessarily rests upon the view that an appellate court has no power to reach an issue not raised or preserved by a party, even though that issue is central to a just and complete resolution of a case and issues properly before the court. Unsurprisingly, petitioner cites no authority for such a radical proposition; and it is plainly unsound. 28 U.S.C. 2106 authorizes this Court and the courts of appeals to

> affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, *and* [*to*] *remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances* [emphasis added].

And Rule 51 does not limit the authority of a court to entertain an issue even if, because of noncompliance with the Rule's requirement, a party has no *right* to raise the issue, especially when consideration of the issue is necessary to resolution of the case. See *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981).

Moreover, this Court has repeatedly made it clear that it is authorized in appropriate cases to notice the errors of lower courts, "to which no exception has been taken, when they 'seriously affect the fairness, integrity, or public reputation of judicial proceedings,'" *Connor* v. *Finch*, 431 U.S. 407, 421 n.19 (1977) (quot-

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of a functionally equivalent substitute facility.

ing *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)); see *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320 n.6 (1971); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 16 (1941); cf. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 247 n.12 (1981). Because the very reasoning that led the court of appeals to reject the government's argument in support of the judgment of the district court also led it inexorably to recognize that entry of judgment based upon the alternate jury verdict would work a manifest injustice to the United States (see page 15, *supra*), it was proper for the court of appeals to remand for further proceedings here.[13]

4.a. For the foregoing reasons, this case simply does not present any question about the availability of a plain error exception to Fed. R. Civ. P. 51, much less any occasion to resolve an alleged conflict among the circuits concerning the availability of such an exception. In any event, the courts of appeals have recognized that in appropriate circumstances jury instructions may be reviewed, upon appeal, for plain error, even though no party has objected to them. See, *e.g.*, *Carrillo* v. *Sameit Westbulk*, 514 F.2d 1214, 1219 (1st Cir.), cert.

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[13] We assume for the purpose of this discussion that, contrary to our position in *United States* v. *50 Acres of Land*, No. 83-____, filed concurrently with this brief, the court of appeals' ruling that substitute facilities costs are an available measure of just compensation is correct. Of course, if we prevail in our own petition, the instant petition would become moot. Because the issues in the two petitions are unrelated, however, and because the issue raised by the City plainly warrants no further review, we submit that it would be appropriate to deny the City's petition without awaiting disposition of our own. We note that the City has not challenged the court of appeals' conclusion that, in applying a substitute facilities measure of compensation, the award must be adjusted to reflect the benefits accruing to the condemnee from the substitute facility. Petitioner raises only the procedural question.

denied, 423 U.S. 1014 (1975); *MacEdward* v. *Northern Electric Co.*, 595 F.2d 105, 109-110 (2d Cir. 1979); *Miller* v. *Premier Corp.*, 608 F.2d 973, 983 (4th Cir. 1979); *Rodrigue* v. *Dixilyn Corp.*, 620 F.2d 537, 540 (5th Cir. 1980); *Batesole* v. *Stratford*, 505 F.2d 804, 808 (6th Cir. 1974); see also 9 Wright & Miller, *Federal Practice & Procedure*, § 2558, at 672 nn.40, 41 (1971). Nor, contrary to petitioner's assertion (Pet. 5), is the rule in the Ninth Circuit to the contrary. Despite language in some earlier Ninth Circuit decisions, the recent decisions of that court recognize that an appellate court is empowered, in proper cases, to review the adequacy of jury instructions even though the party harmed by the instruction has not objected. See *Brown* v. *AVEMCO Investment Corp.*, 603 F.2d at 1370-1375; *Wellman* v. *Jellison*, 593 F.2d 876, 878 (9th Cir. 1979); *Robinson* v. *Heilman*, 563 F.2d 1304, 1306 (9th Cir. 1977).

b. Petitioner also claims (Pet. 7-9) that the court of appeals failed to adhere to its own decisions that condition the availability of review under the plain error doctrine upon a showing that a miscarriage of justice has occurred. The asserted intra-circuit conflict in no event warrants this Court's review. Moreover, because, as we have explained above (pages 10-16, *supra*), the court of appeals did not need to rely upon (and did not invoke) the plain error doctrine, petitioner's contention is without substance.[14] In any event, because the court of appeals recognized that to direct entry of judgment upon the alternate verdict rendered based on the district court's substitute facilities instructions might confer a wholly unjustified windfall upon petitioner at the

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[14] Sua sponte review is not limited by the contours of the plain error doctrine, whatever they may be. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 256.

expense of the public fisc, reliance upon the plain error rule would not have been impermissible.

CONCLUSION

The petition for a writ of certiorari should be denied.[15]

Respectfully submitted.

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JANUARY 1984

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[15] See page 16 note 13 *supra*.